UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

92 M.S.P.R. 298

MARK S. RUSIN, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER CH-1221-00-0028-W-1 DATE: September 4, 2002

Peter H. Noone, Esquire, Belmont, Massachusetts, for the appellant.

Richard E. Hurst, Esquire, Washington, D.C., for the agency.

BEFORE

Susanne T. Marshall, Chairman
Beth S. Slavet, Member
Member Slavet issues a separate opinion.

OPINION AND ORDER

¶1 The appellant petitions for review of the January 21, 2000 initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition, REVERSE the initial decision, and REMAND the appeal to the Central Regional Office for further adjudication.

BACKGROUND

¶2 The appellant worked as a GS-15 Assistant Special Agent in Charge (ASAC) in the agency's Chicago office of the Bureau of Alcohol, Tobacco, and

Firearms (ATF). Initial Appeal File (IAF), Tab 1. On November 5, 1998, he claims to have received an anonymous note which stated that his supervisor, Special Agent in Charge Kathleen Kiernan, had used her government-issued credit card to make inappropriate and personal purchases. *Id.*, Tab 4, Exh. 1. The appellant asked Sue Sabella, who kept the office credit card records, for the folder containing Ms. Kiernan's records. *Id.*, Tab 4. The appellant discovered that, using her government-issued credit card, Ms. Kiernan had purchased fourteen lighters and eight key chains, all with the ATF logo on them. *Id.*, Tab 4, Exh. 2. These purchases were listed on the credit card certification as office supplies. *Id.* The appellant asked Ms. Sabella why this was so, and she responded that she did as she was told. *Id.*, Tab 8. The appellant took this to mean that Ms. Kiernan had informed Ms. Sabella to call these items office supplies. *Id.*

¶3 On November 9, 1998, the appellant reported these purchases to his second level supervisor, Malcolm Brady, and to the ATF Office of Inspection. IAF, Tab 1. On March 10, 1999, the appellant sought corrective action from the Office of Special Counsel (OSC), claiming that the agency had retaliated against him for reporting Ms. Kiernan's violation of a law, rule, or regulation and abuse of authority. IAF, Tab 8, Answer to Question 11a. The appellant claimed that this retaliation took the form of delaying the completion of his Senior Executive Service training, issuing him a letter of reprimand, altering his performance evaluation for the worse, failing to select him for an ASAC position in Phoenix, reporting to the ATF Ombudsman that he has an alcohol problem, and transferring him to Washington, D.C. *Id.*; IAF, Tab 8, Answers to Questions 7, 11.

¶4 On August 30, 1999, OSC sent the appellant a letter notifying him of his right to seek corrective action from the Board through an IRA appeal because it was terminating its investigation of his complaint. IAF, Tab 1. The appellant timely filed his IRA appeal with the Board. *Id.* The administrative judge

dismissed the appellant's appeal without holding a hearing, finding that the appellant had failed to make a non-frivolous allegation that the Board had jurisdiction over his appeal. IAF, Tab 10. The administrative judge found that the agency's Procurement Instruction Memorandum 88-35 and its ATF Government Commercial Credit Card Program are not laws, rules, or regulations; therefore, the appellant's assertion that Ms. Kiernan violated them is not a protected disclosure.[1] *Id.* at 4. She further found that the appellant's claim that Ms. Kiernan abused her authority by telling Ms. Sabella to misrepresent the purchase of lighters and key chains as office supplies is not a protected disclosure because the appellant could not have reasonably believed that Ms. Kiernan's alleged actions resulted in her own personal gain or the gain of preferred others or adversely affected the rights of others. *Id.* at 4-5.

¶5 The appellant timely petitioned for review of the initial decision. Petition for Review File (PFRF), Tab 1. The agency timely responded in opposition. *Id.*, Tab 3. After the close of the record on review, the appellant submitted a reply to the agency's response. *Id.*, Tab 4. Because his reply was submitted after the close of the record and does not contain evidence which was not readily available before the record closed, we do not consider this submission. 5 C.F.R. § 1201.114(i). The appellant subsequently filed a motion to supplement his petition for review because the Board had recently issued *Ganski v. Department of the Interior*, 86 M.S.P.R. 32 (2000). PFRF, Tab 6. The agency filed an opposition to this motion. PFRF, Tab 5. The appellant's motion to supplement his petition for review is DENIED. He may argue the relevance of *Ganski* on remand.

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[1] Procurement Instruction Memorandum 88-35 states: "Don't buy give-away items such as plaques, cufflinks, plastic holders for credentials, bracelets, ashtrays, Christmas cards, paperweights, cigarette lighters, key chains, and similar mementos." The ATF Government Commercial Credit Card Program states that a government credit card "must not be used for personal purchases" or for "employee awards." IAF, Tab 8.

ANALYSIS

¶6 The appellant's primary argument in his petition for review is that the administrative judge erred by denying him a hearing. He argues that he was entitled to a jurisdictional hearing because he raised non-frivolous allegations of fact which, if proven**,** were sufficient to show jurisdiction. PFRF, Tab 1 at 4. He further argues that the administrative judge erred because the Board has held that the decision as to whether an individual is reasonable in his belief that he has disclosed a violation of law, rule, or regulation or one of the other conditions listed in 5 U.S.C. § 2302(b)(8) requires a hearing. PFRF, Tab 1 at 5.

¶7 As explained below, we have determined that the appellant's factual allegations entitle him to a remand for a hearing to give him the opportunity to show that he made a protected disclosure within the meaning of the statute. This determination raises the question of whether such a hearing should be one limited to the issue of the Board's jurisdiction or whether the appellant is entitled to a hearing on the merits of his claim. The question arises because, as the Board's reviewing court has recently noted, the Board and the court have taken different approaches to what is required to establish the Board's jurisdiction over IRA appeals under 5 U.S.C. § 1221. *See Yunus v. Department of Veterans Affairs,* 242 F.3d 1367, 1372 n.1 (Fed. Cir. 2001).

¶8 The rule for establishing IRA jurisdiction that has been followed by the Board since 1994 was first stated in *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). *Geyer* held that to establish the Board's jurisdiction over an IRA appeal an appellant must *prove* by preponderant evidence that: (1) he engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); (2) the agency took or failed to take a personnel action as defined in 5 U.S.C. § 2302(a)(2); and (3) he raised the whistleblower issue before OSC and proceedings before OSC have been exhausted. *See also Kaeseman v. Department of Veterans Affairs,* 63 M.S.P.R. 236, 238-39 (1994) (in order to establish jurisdiction over an IRA, employee must prove the above-stated *Geyer*

elements by the preponderance of the evidence). Under *Geyer*, an appellant is sometimes able to establish the Board's jurisdiction through his pleadings and written submissions. In cases such as this one, where an appellant has alleged facts that, if proven, would establish the Board's jurisdiction, under *Geyer* the appellant is entitled to an opportunity to prove jurisdiction through a jurisdictional hearing. *See Bump v. Department of the Interior*, 64 M.S.P.R. 326, 332 (1994). Regardless of the manner in which an appellant establishes jurisdiction, however, in order to prevail on the merits, *Geyer* requires the appellant to prove by the preponderance of the evidence the causal connection between his protected whistleblowing and the personnel action subsequently taken by the agency. At that point in the proceedings, in order for the agency to prevail on the merits, it must show by clear and convincing evidence that it would have taken the personnel action regardless of the appellant's whistleblowing. *See Kaeseman v. Department of Veterans Affairs*, 63 M.S.P.R. at 239; *Gilmore v. Department of the Army*, 83 M.S.P.R. 16, ¶ 8 (1999); *Johnson v. Department of Defense*, 87 M.S.P.R. 454, ¶¶ 7-8 (2000).

¶9 The Federal Circuit acknowledged in *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001), that some of its decisions appear to have adopted the *Geyer* approach to the Board's jurisdiction under section 1221. *See id.* at 1372 n.1, *citing inter alia Serrao v. Merit Systems Protection Board*, 95 F.3d 1569, 1574 (Fed. Cir. 1996); *Herman v. Department of Justice*, 193 F.3d 1375, 1378 (Fed. Cir. 1999). However, in *Yunus* and other cases, the court has apparently rejected *Geyer*, stating that an individual who has exhausted his OSC remedy establishes the Board's IRA jurisdiction by making *non-frivolous allegations* that he made a protected disclosure and that his disclosure was a contributing factor in the agency's decision to take or fail to take a covered personnel action against him. *See id.* at 1371-72; *see also Schmittling v. Department of the Army*, 219 F.3d 1332, 1336 (Fed. Cir. 2000); *Willis v. Department of Agriculture*, 141 F.3d 1139, 1142 (Fed. Cir. 1998). Under these

cases, the making of such allegations establishes the Board's jurisdiction to adjudicate the appellant's claim on the merits. To prevail on the merits, the appellant is then required to prove these elements by preponderant evidence. But the agency, as in *Geyer*, may still prevail if it shows by clear and convincing evidence that it would have taken the action in the absence of the appellant's whistleblowing. *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1034 (Fed. Cir. 1993); *Kewley v. Department of Health & Human Services*, 153 F.3d 1357, 1361 (Fed. Cir. 1998).

¶10 The *Geyer* approach is at variance with the *Yunus* approach in two ways. First, the approaches differ in their treatment of the "causative" element of a whistleblower claim. Under *Geyer*, the causal connection between the appellant's alleged whistleblowing and the alleged personnel action is treated solely as an element of the claim on the merits, and not as part of the jurisdictional showing. Under the court's approach, the causative element is a merits element that the appellant must prove in order to prevail, a non-frivolous allegation of a causal link is part of the required jurisdictional showing.[2] This difference also reflects a second, more basic difference between the two approaches. While *Geyer* treats establishing jurisdiction as a matter of proof, an appellant establishes Board jurisdiction in an IRA appeal under *Yunus* by merely exhausting his OSC remedy and making non-frivolous allegations that he made a protected disclosure that was a contributing factor in a covered personnel action.

¶11 Although *Yunus* did not explicitly overrule the Board's decision in *Geyer*, the court made clear that it disapproved of the *Geyer* approach, and it set forth

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[2] Requiring a non-frivolous allegation of the "causative element" as part of the jurisdictional showing has the sensible effect of not requiring the Board to entertain on the merits claims concerning personnel actions which were taken prior to the appellant's alleged whistleblowing and which thus could not, as a metaphysical reality, have contributed to the personnel action. *See Horton v. Department of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995).

what it determined was the correct rule for establishing the Board's jurisdiction in IRA appeals. *See Yunus*, 242 F.3d at 1371-72 and n.1. The Board is required to follow the decisions of the U.S. Court of Appeals for the Federal Circuit, its reviewing court. *Amarille v. Office of Personnel Management*, 68 M.S.P.R. 424, 426 (1995). We therefore adopt the *Yunus* approach here as the appropriate jurisdictional formulation in IRA appeals.

¶12 Accordingly, we find that the Board has jurisdiction over an IRA appeal if the appellant has exhausted his OSC remedies and makes non-frivolous allegations that he made a disclosure protected under section 2302(b)(8), and the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). We therefore overrule the holdings of *Geyer v. Department of Justice*, 63 M.S.P.R. 13 (1994), and cases relying on it that follow a different approach than *Yunus*.[3]

¶13 Applying this analysis, we find that the appellant has made his jurisdictional showing. First, he sought corrective action from and exhausted proceedings before OSC. IAF, Tab 1. It is also clear that the appellant made non-frivolous allegations that his disclosure was a contributing factor in the agency's decisions to take covered personnel actions against him. Specifically, he alleged that the agency took several actions that are defined as "personnel actions" in 5 U.S.C. § 2302(a)(2)(A).[4] IAF, Tab 8, Answers to Questions 11a &

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[3] We note that several recent Board decisions have applied the *Yunus* test, but did not overrule *Geyer*. *Harvey v. Department of the Navy*, MSPB Docket. No. DC-1221-00-0425-W-1 (July 16, 2002); *Lachenmyer v. Federal Election Commission*, MSPB Docket No. DC-1221-01-0439-W-1 (July 25, 2002).

[4] The appellant alleged that a letter of reprimand, a performance evaluation which the agency effected under 5 U.S.C. chapter 43, a non-selection, and a transfer were among the actions the agency took in retaliation for his whistleblowing. IAF, Tab 8. We find that the appellant has made nonfrivolous allegations that these three actions are covered personnel actions under 5 U.S.C. § 2302(a)(2)(A). The administrative judge must determine on remand whether the additional actions the appellant alleges the agency took also fall within the statutory definition of personnel action.

11d. Moreover, he made detailed, factual allegations that the agency officials responsible for these personnel actions were aware of his disclosure and acted within such time that a reasonable person could find that the disclosure contributed to the actions. IAF, Tab 8, Answer to Question 13. Thus, if the appellant has made a non-frivolous allegation that his disclosure was protected under 5 U.S.C. § 2302(b)(8), he has established the Board's jurisdiction.

¶14 We find that Mr. Rusin has established this remaining jurisdictional element. Section 2302(b)(8) protects disclosures which an employee reasonably believes evidence "(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." The appellant alleged below that Ms. Kiernan violated a law, rule, or regulation by purchasing lighters and key chains with her government-issued credit card. Specifically, he alleged that she violated the agency's Procurement Instruction Memorandum 88-35's Don't Buy List (PIM List), IAF, Tab 9, Att. A, and ATF's Government Commercial Credit Card Program (GCCCP), *id.*, Tab 1, Exh. 4. The administrative judge found that neither of these were rules or regulations, stating that the PIM List was "nothing more than its title suggests: a memorandum containing instructions" and that the GCCCP was similarly not a law, rule, or regulation. IAF, Tab 10 at 4. The appellant challenges this ruling in his petition for review, continuing to claim that the alleged violations of the PIM List and the GCCCP constitute violations of a rule or regulation. PFRF, Tab 1.

¶15 We agree with the appellant that he alleged a violation of a rule within the meaning of the section 2302(b)(8).[5] Contrary to the administrative judge's approach, the determination of whether or not something is a "rule" for purposes of the Whistleblower Protection Act (WPA) cannot be based merely on its title.

[5] Because we find that the PIM List and the GCCCP are "rules," we do not need to address whether they are "regulations."

A more substantive examination of these documents is required. The PIM "Don't Buy List" consisted of 17 sections, each entitled a "rule," which prohibited the purchase of various items. Tab 9, Attachment A. The document stated that these items were "not authorized for purchase" in "accordance with the Department of Treasury Procurement Instruction Memorandum 88-35." *Id.* The "rules" describing the prohibited items were followed by paragraphs entitled "exceptions/conditions." The PIM rule whose violation the appellant contends he disclosed stated: "[d]on't buy give-away items such as plaques, cufflinks, plastic holders for credentials, bracelets, ashtrays, Christmas cards, paperweights, cigarette lighters, key chains, and similar mementos." *Id*. at 3.[6] The GCCCP, which the appellant asserts is also a rule which the agency violated, describes in detail the conditions and responsibilities governing the proper use of the government credit card, addressing such topics as the proper approving official, alternative approving official, procedures for the issuance of the card, and the criminal and civil penalties for improper use of the card. IAF, vol. 3, attachments to tab 8. The document also details the five conditions that each purchase must meet, states that the card "must not be used for any personal purchases," and lists 12 categories of items whose purchase is prohibited. *Id*. Among the prohibited items are "employee awards." *Id*. We find that the content and purpose of the PIM List and the GCCCP strongly support a finding that these documents were rules, with the meaning of section 2302(b)(8).

¶16 Other considerations support a conclusion that these documents qualify as rules under section 2302(b)(8). The subsection of the statute governing

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[6]The "exception/condition" following this rule stated that "[a]ward materials may be purchased if they are part of a program approved by the personnel office and funded from an account specifically for this purpose." *Id*. In the instant case, there was no indication on the procurement document that the purchase of the lighters and key chains was authorized by the personnel office or was made from a special account set up specifically for award materials. IAF, vol. 3, attachments to tab 8, purchase order dated 10/9/98.

prohibited personnel practices which defines terms does not define "rule," 5 U.S.C. § 2302(a)(2), nor does the legislative history of the Civil Service Reform Act, which first created section 2302,[7] shed any light on the definition of a "violation of . . . rule." Moreover, neither the Board nor the Federal Circuit has defined the word "rule" as it is used in section 2302(b)(8). In determining the meaning of a word, the provisions of a statute should be read in harmony, leaving no provision inoperative, superfluous, redundant, or contradictory. *Holley v. United States*, 124 F.3d 1462, 1468 (Fed. Cir. 1997). Thus, because the term "rule" is in the same subsection of the statute as "law" and "regulation," 5 U.S.C. § 2302(b)(8)(A)(i), it must be given a distinct meaning from them. A "fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Black's Law Dictionary defines "rule" as "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation." Black's Law Dictionary 1330 (7th ed. 1999). Barron's Law Dictionary defines "rule" as "a prescribed guide for action or conduct, regulation or principle." Barron's Law Dictionary 427 (3d ed. 1991).

¶17 It is well established that the WPA is a remedial statute intended to improve protections for federal employees and, as such, it should be broadly construed in favor of those whom it was intended to protect. *Keefer v. Department of Agriculture*, 82 M.S.P.R. 687, ¶ 13 (1999). Given the purpose of the WPA and the dictionary definitions of "rule," without specifically adopting a definition here to be applied to all future cases, we believe that the appellant has made a nonfrivolous allegation that he disclosed violations of two rules.

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[7] Section 2302(b)(8) has subsequently been amended; however, none of the amendments defines the term "rule" or otherwise affects the issues in this appeal.

¶18 In order for a disclosure to be considered protected under section 2302(b)(8), the employee must have had a "reasonable belief" that it evidences a violation of law, rule, or regulation or one of the other conditions set out in the statute. *See Lachance v. White*, 174 F.3d 1378, 1380-81 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1157 (2000). In the instant appeal, the administrative judge found that the appellant failed to show that he had a reasonable belief he disclosed a violation within the meaning of section 2302(b)(8). However, without adopting a specific definition of a "rule" here, in order to establish jurisdiction under the *Yunus* test, the appellant was required only to make a non-frivolous allegation that he reasonably believed that the information he disclosed evidenced a violation of a rule. As explained below, we believe that the appellant met this test.

¶19 To determine whether an employee had a reasonable belief that his disclosure evidenced a violation of a law, rule, or regulation, the test is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidence a violation of a law, rule, or regulation. *See Lachance v. White*, 174 F.3d at 1381. In the instant appeal, the appellant alleged that after he received the anonymous note alleging that Ms. Kiernan had been misusing her government-issued credit card, he reviewed Ms. Kiernan's credit card records and discovered a procurement order showing that Ms. Kiernan had purchased lighters and key chains with a government credit card. IAF, Tab 8, Answer to Question 6. The appellant alleged that he reasonably believed that these purchases violated the PIM List and the GCCCP. *Id.* After reviewing the relevant provisions of the PIM List and the GCCCP, which we discussed above, we find that the appellant has made a non-frivolous allegation that a disinterested observer with knowledge

of the information he disclosed about Ms. Kiernan's purchases could reasonably believe that her actions were a violation of these rules.[8]

¶20 For the reasons stated above, we conclude that the appellant has exhausted his OSC remedy and has made non-frivolous allegations that he engaged in protected whistleblowing that contributed to covered personnel actions taken against him. Accordingly, the test for establishing the Board's IRA jurisdiction has been met, and the appellant is entitled to a hearing on the merits of his claim.[9]

ORDER

¶21 The initial decision, which held that the appeal was not within the Board's jurisdiction, is REVERSED. The appeal is REMANDED to the Central Regional Office for further adjudication consistent with this Opinion and Order.

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[8] Without further evidence concerning the context of the appellant's disclosure, we do not make a finding that the appellant in fact had a reasonable belief that his information disclosed a violation of these rules, but he will have the opportunity to support such a merits finding on remand.

[9] Because the appellant's allegations with respect to three personnel actions meet the *Yunus* jurisdictional test, this case has reached the merits stage with respect to those personnel actions. It is within the sound discretion of the administrative judge to take the merits issues in the order she determines is the most efficient. *See Dick v. Department of Veterans Affairs*, 290 F.2d 1356, 1363-64 (Fed. Cir. 2002).

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

Separate Opinion of Beth S. Slavet,
Board Member

in

Rusin v. Department of Treasury,

MSPB Docket No. CH-1221-00-0028-W-1

¶1 I agree with the majority opinion that the Board should adopt the jurisdictional test for IRA appeals which the Federal Circuit has set forth in *Yunus v. Department of Veterans Affairs,* 242 F.3d at 1367, 1372 n.1 (2001), and must overrule its contrary precedent in *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). I also agree that the appellant has met the *Yunus* test, and that this appeal must be remanded to afford the appellant a hearing on the merits of his IRA appeal. I write separately because I believe the *Yunus* analysis of the "second, more basic difference" between the allegation and proof approaches (see majority op. ¶ 10) and the Board's decision adopting *Yunus* must be viewed through a wider lens than a decision that focuses almost solely on the holdings in *Geyer* and *Yunus*.[10]

¶2 The case law addressing the distinction between jurisdiction and merits in Board appeals and the requirements for an appellant to establish Board jurisdiction did not begin with either *Yunus* or *Geyer*. This case law spans nearly two decades and includes two cases, *Spruill v. Merit Systems Protection Board*, 978 F.2d 679 (Fed. Cir. 1992), and *Cruz v. Department of the Navy,* 934 F.2d 1240 (Fed. Cir. 1991) (in banc), which are particularly significant to

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[10] The first difference, which I do not address here, is that the causal connection between the appellant's protected disclosure and the personnel action is initially a jurisdictional element under *Yunus* but is a merits element under *Geyer*. *See* majority op. at ¶ 10. For a description of the history and factual background in this case, *see* ¶¶ 2-5 of the majority opinion.

understanding the implications of today's decision. The majority opinion does not mention these cases but I believe they merit discussion because *Yunus* and *Geyer* cannot be understood in a vacuum. In particular, the *Spruill* decision, which the court in *Yunus* explicitly followed and recognized as controlling precedent, 242 F.3d at 1372 n.1, has critical implications for the Board's adjudication of IRA appeals. Indeed, the proper disposition of this appeal on remand may be governed by principles that were set forth in *Spruill*, but are not mentioned in *Yunus* nor addressed in our majority opinion.

¶3 *Cruz* is another significant decision in the line of cases addressing the Board's jurisdiction that is relevant to our decision to adopt *Yunus* and overrule *Geyer*. Our majority decision is silent on *Cruz*, but I believe it merits discussion because, on its face, the in banc decision in *Cruz* appears to be controlling precedent that conflicts with *Yunus* and supports the *Geyer* approach to the Board's jurisdiction, i.e., requiring the appellant to prove, not just plead, the facts that give the Board jurisdiction to hear the appeal. *See Cruz*, 934 F.2d at 1248. Given this long history of Federal Circuit precedent that is relevant to our decision to adopt the *Yunus* approach and to overrule *Geyer*, I believe it is appropriate to explain the reasons for our decision in light of the court's divergent lines of precedent.

THE JURISDICTIONAL TEST FOR IRA APPEALS

¶4 As stated above, to fully understand the implications of the Board's decision, I believe it is necessary to discuss *Yunus* and *Geyer* in the larger context of Board and court decisions which have addressed the requirements for establishing the Board's jurisdiction, as well as the legal principles that underlie those decisions. It is clear from *Yunus* that the court took great care to craft a thoughtful decision which would send the Board a clear message that it disapproved of the *Geyer* decision, while at the same time candidly recognizing that some of its own decisions had implicitly endorsed the *Geyer* approach. 242 F.3d at 1372 n.1. I would like to acknowledge the court's efforts and to attempt

to respond in the same vein. In particular, I believe it is important to attempt to explain to the court and to Board practitioners why, in my view, the Board has been reluctant to adopt the underlying principle that is at the heart of the *Yunus* approach to jurisdiction, i.e. that the Board's jurisdiction is a matter of *pleading*, not of *proof*. That overarching principle (which is the most basic difference between *Geyer* and *Yunus*, *see* majority op, at ¶ 10) derives from *Spruill* and a long line of federal court precedent on which *Spruill* relied. *See* 978 F.2d at 687-688. The focus of the analysis that follows is the scope and implications of this principle as applied to Board proceedings.

¶5 As our majority opinion states, since 1994, the Board has followed its decision in *Geyer* for determining the jurisdictional test that appellants must meet in IRA appeals. *Geyer* held that to establish the Board's jurisdiction over an IRA appeal an appellant must *prove* by preponderant evidence that: (1) he engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); (2) the agency took or failed to take a personnel action as defined in 5 U.S.C. § 2302(a)(2); and (3) he raised the whistleblower issue before OSC and proceedings before OSC have been exhausted.

¶6 While *Geyer* requires appellants to *prove* the facts that give the Board jurisdiction, under the *Spruill-Yunus* line of cases, an individual establishes Board jurisdiction by merely exhausting his OSC remedy and making *non-frivolous allegations* that he made a protected disclosure that was a contributing factor in a covered personnel action. In *Yunus*, the Federal Circuit acknowledged that in a few cases it had appeared to adopt the *Geyer* approach to the Board's jurisdiction under section 1221, but it held that to the extent those cases conflicted with *Spruill*, it was obligated to follow *Spruill*, which was its earlier precedent. *Yunus v. Department of Veterans Affairs*, 242 F.3d at 1372 n.1, *citing inter ali*a *Serrao v. Merit Systems Protection Board*, 95 F.3d 1569, 1574 (Fed. Cir. 1996); *Herman v. Department of Justice*, 193 F.3d 1375, 1378 (Fed. Cir. 1999). In *Spruill*, the Federal Circuit had adopted a different approach to the

Board's IRA jurisdiction, enunciating an alternative nomenclature for the Board's IRA jurisdiction based on an analogy to federal question jurisdiction in the federal courts.[11] 978 F.2d at 686-89. In *Spruill*, the Federal Circuit stated, and in subsequent cases following its declaration held, that an individual who has exhausted his OSC remedy establishes the Board's IRA jurisdiction by making *non-frivolous allegations* that he made a protected disclosure and that his disclosure was a contributing factor in the agency's decision to take or fail to take a covered personnel action against him. *See, e.g., Yunus v. Department of Veterans Affairs*, 242 F.3d at 1371-72; *Schmittling v. Department of the Army*, 219 F.3d 1332, 1336 (Fed. Cir. 2000); *Willis v. Department of Agriculture*, 141 F.3d 1139, 1142 (Fed. Cir. 1998). Under these cases, the making of such allegations establishes the Board's jurisdiction to adjudicate the appellant's claim on the merits. To prevail on the merits, the appellant is required to prove these elements by preponderant evidence, but the agency may still prevail if it shows by clear and convincing evidence that it would have taken the action in the absence of the appellant's whistleblowing. *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1034 (Fed. Cir. 1993); *Kewley v. Department of Health & Human Services*, 153 F.3d 1357, 1361 (Fed. Cir. 1998).

¶7 Under the *Spruill-Yunus* approach, jurisdiction is established by properly alleging or stating the elements of a whistleblower claim, while establishing the

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[11] In *Spruill*, the appellant claimed that his three-day suspension was based on his filing of an EEO complaint and thus was a reprisal for whistleblowing. The court upheld the Board's determination that disclosures in an EEO complaint were not protected whistleblowing under 5 U.S.C. § 2302(b)(8), but rather were protected from retaliation by 5 U.S.C. § 2302(b)(9), and it affirmed the Board's dismissal for lack of jurisdiction on this basis. However, while ultimately affirming the Board, the court engaged in a long discussion placing the Board's jurisdiction and procedures within the context of federal question jurisdiction and specifically stating that the Board's IRA jurisdiction was established by nonfrivolous allegation of the elements of a whistleblower claim, without proof of those elements being required. *See* 978 F.2d at 686-89. In Spruill's case the court found that the allegations in his complaint failed to pass this initial jurisdictional threshold. *Id*. at 689-92.

merits of the claim requires proof of those elements. *See Spruill*, 978 F.2d at 689; *Yunus*, 242 F.3d at 1372-73. Thus, the same element may be both a jurisdictional and a merits element depending on whether the case is at the initial pleading or at the evidentiary stage. *See Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1019 (Fed. Cir. 2002); *Dick v. Department of Veterans Affairs*, 290 F.3d 1356, 1361 (Fed. Cir. 2002).

¶8 The Board has not previously adopted this jurisdictional approach to IRA cases. First, as noted earlier, *see* majority op. at ¶ 9, the court has not always consistently followed it. Second, the Board has considered itself bound by the court's decision in *Cruz v. Department of the Navy*, 934 F.2d 1240 (Fed. Cir. 1991) (in banc), holding that the jurisdictional determination of whether an appellant was constructively removed is properly based on the weight of the evidence, not on the sufficiency of the appellant's allegations. *Cruz* was an in banc decision, binding in subsequent cases, and it was issued prior to *Spruill*. As the court noted in *Yunus*, 242 F.3d at 1272 n.1, *citing Newel Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988), in the case of a direct conflict between decisions of the court, the first decision is the precedential one.[12] Finally, the

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[12] In the years since the court decided *Spruill*, confusion has reigned within the Board concerning what aspect of the decision was holding and what aspect dicta, whether *Spruill* was reconcilable with *Cruz*, and whether the decision was internally consistent. The court has not conclusively resolved these issues, although its recent decisions have treated *Spruill's* merits/jurisdiction analysis as part of the holding of the case. I now believe that *Spruill* should be read as seeking to clarify *Cruz* by declining to read *Cruz* literally and by finding that its holding can be stated in terms consistent with *Spruill's* approach to jurisdiction. According to *Spruill*, *Cruz* addressed and correctly decided the issue of whether the Board could reach the petitioner's claim of discrimination concerning his alleged involuntary removal when the Board had already rejected his involuntary removal claim on the merits. "[A]bsent proof of a cause of action for involuntary removal, there was nothing to which the discrimination claim could append." 978 F.2d at 689. Thus, *Spruill* explained *Cruz* as really addressing the merits issue of whether a constructive removal claim was established and not merely the Board's jurisdiction. However, the Board has hesitated to adopt *Spruill*'s reading of *Cruz* because this part of the decision in *Spruill* appeared to be dicta. *See Anderson v. Small Business Administration*, 78 M.S.P.R. 518 n.* (1998). Additionally, it is difficult

Board has found that it was unnecessary to resolve the conflict between its rule and the court's rule in prior cases where the Board determined that the same result as to its jurisdiction would be reached under either analysis. *See, e.g., Comito v. Department of the Army*, 90 M.S.P.R. 58, 62 n.2 (2001); *Chakravorty v. Department of the Air Force*, 90 M.S.P.R. 304, 308-09 (2001).

¶9 In *Yunus*, the court made clear that it disapproved of the Board's *Geyer* approach, although it did not explicitly reverse the Board's decision, which had applied *Geyer*. *See Yunus*, 242 F.3d at 1372 n.1. I think that it is particularly appropriate to reexamine the *Cruz-Spruill* aspect of *Yunus-Geyer* conflict in this case because of the possibility of a different result on remand depending upon which line of cases we follow. If the appellant were to fail to prove on remand that he made a protected disclosure, and we were to apply *Geyer*, it would require a dismissal for lack of jurisdiction. However, the *Spruill-Yunus* rule would dictate a Board dismissal on the merits of the appellant's claim.

¶10 I believe that with respect to IRA appeals, the Board is bound to follow not only the jurisdictional test set forth in *Yunus*, but the *Spruill* decision, the precedent which *Yunus* cited and recognized as controlling. *Yunus*, 242 F.3d at 1372 n.1. Both *Spruill* and *Yunus* specifically address the Board's IRA jurisdiction under section 1221, and they both require the Board to base its jurisdiction on the appellant's nonfrivolous allegations of jurisdictional elements, not on proof of those elements. *Yunus*, 242 F.3d at 1371; *Spruill*, 978 F.2d at 688-89. Thus, because I believe that the approach to IRA jurisdiction that the Board adopts today is as much based on *Spruill* as it is on *Yunus*, I believe the

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to reconcile the jurisdiction/merits discussion in *Spruill* with the decision's holding that affirmed the Board's dismissal of the petitioner's appeal for lack of jurisdiction. *See* note 2 *supra*, and note 5, *infra*.

Board should recognize that its approach to IRA jurisdiction is governed by both *Spruill* and *Yunus.*[13]

¶11 Under the *Spruill-Yunus* approach, which I would adopt here as the appropriate jurisdictional formulation in IRA appeals, an appellant who has made nonfrivolous allegations of the elements of a whistleblower claim will be entitled to a hearing on the merits at which the appellant will have the opportunity to prove his claim. Once an appellant has met the *Yunus* jurisdictional test, administrative judges may use their discretion to focus initially, where appropriate, on the particular elements of the claim which it appears may be dispositive in the particular case. *See Yunus v. Department of Veterans Affairs,* 242 F.3d at 1372 (after nonfrivolous allegations establishing jurisdiction were made, the Board did not err in deciding the case on the basis of the agency's affirmative defense without determining whether the employee proved his disclosures were protected); *Dick,* 290 F.3d at 1363-64.

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[13] The court's decision in *Cruz v. Department of the Navy* is contrary to *Spruill* because it requires an appellant to prove, not just plead, the facts that give the Board jurisdiction. *Compare Cruz,* 934 F.2d at 1244-45 *and Spruill,* 978 F.2d at 686-89. Indeed, under the governing rule that the court must follow the earlier decision of a panel (*see Newel,* F.2d at 765, *cited in Yunus,* 242 F.3d at 1372 n.1), *Cruz* would seem to be the precedential decision. One court has found that *Spruill* and *Cruz* set forth two conflicting tests for establishing jurisdiction and has held that *Cruz* controls over *Spruill. Maniere v. United States,* 31 Fed. Cl. 410, 413-15 (1993). However, I would now find that *Cruz* is inapplicable to IRA appeals because it addresses an involuntary resignation or constructive termination - a court-created adverse action which, if proven, falls within the Board's chapter 75 jurisdiction. As noted above, *Spruill* stated that its approach to the jurisdiction/merits distinction should be applied to constructive action cases like *Cruz* where the merits turn on the existence of facts which are also the predicate for jurisdiction. 978 F.2d at 689. *But see Anderson v. Small Business Administration,* 78 M.S.P.R. 518, 520-21 n.* (1998) (the involuntariness of a resignation or retirement is a jurisdictional issue under *Cruz v. Department of the Navy,* which is controlling precedent). The Board need not decide this issue here because this case does not present an involuntary resignation or other constructive action. However, I note that in most actions made appealable to the Board by law, rule or regulation and heard under 5 U.S.C. § 7701, the jurisdictional elements of an appeal (whether there was an appealable agency action against a covered employee) do not overlap with the merits of the appeal (whether the action was justified under the applicable standard).

¶12 In cases where formerly an IRA appellant's failure to prove (after a hearing if one was requested) that he made a protected disclosure would have resulted in a jurisdictional dismissal, the dismissal will now be on the merits for failure to prove the claim.[14] Thus, in the instant appeal, if the appellant fails to establish by a preponderance of the evidence that he had a reasonable belief that the information he disclosed evidenced a violation of the agency's rules, the administrative judge should dismiss his appeal for failure to prove a claim upon which relief can be granted. *See Spruill*, 978 F.2d at 689 ("When a nonfrivolous claim for relief has been asserted before the Board, and the outcome is determined by whether the facts support the claim, a decision by the Board that they do not is a failure to prove a claim, not a lack of jurisdiction…").

¶13 I also think it is important to address the *Cruz/Spruill* jurisdictional dichotomy because of the secondary effects of a dismissal for failure to state or prove a claim. A determination by the Board to dismiss an appeal for failure to state or prove a claim upon which relief can be granted has critical legal

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[14] The court has indicated that in some IRA appeals, dismissal for failure to state a claim will be appropriate and such dismissals can properly occur without first affording the appellant a hearing. *See Meuwissen v. Department of Interior*, 234 F.3d 9 (Fed. Cir. 2000) (upholding dismissal for failure to state a claim because on its face the asserted "whistleblowing" made no disclosure of a violation of law within the meaning of the statute). However, I confess I still find it difficult to determine from the court's decisions when the Board is required to dismiss an appeal for failure to state a claim as opposed to dismissing for lack of jurisdiction. In a post-*Yunus* case involving circumstances that were nearly identical to *Meuwissen*, and where the court cited to *Meuwissen* as controlling, the court affirmed the Board's dismissal for lack of jurisdiction without addressing why it was not applying the *Spruill / Meuwissen* failure-to-state-a-claim analysis and conclusion. *See Francisco v. Office of Personnel Management*, No. 02-3028, 20002 WL 1461907 (Fed. Cir. July 9, 2002). In light of the significant consequences that flow from a dismissal for failure to state a claim, which I discuss in a later part of this opinion, I believe that the Board should be extremely cautious in dismissing cases without a hearing for failure to state a claim until further guidance on this issue is forthcoming from the court. Until then, I believe the Board should dismiss IRA appeals for failure to state a claim only when there is no question that the Board, as a matter of law, cannot grant any relief.

consequences because such dismissals are decisions on the merits. *Spruill*, 978 F.2d at 687-88. A decision on the merits has greater preclusive effect in subsequent actions than a jurisdictional decision since the res judicata effect of a merits decision (claim preclusion) bars consideration of arguments that could have been presented in support of the claim but were not, while the preclusive effect of a jurisdictional dismissal (collateral estoppel or issue preclusion) is limited to issues that were actually litigated. *See Baker and Thomas v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998). *See also Bump v. Department of the Interior*, 64 M.S.P.R. at 331-33 (jurisdictional dismissal of prior IRA appeal for failure to exhaust OSC remedy did not bar second IRA appeal of same claim after OSC remedy was exhausted). Because the Board's section 1221 jurisdiction is limited to whistleblower claims, the greater res judicata effect of an IRA merits dismissal may well be limited to preclusion of a second appeal challenging the same personnel action as based on different disclosures that were not brought to OSC and the Board in the first action, although they could have been.[15] Even so, it would be appropriate to attempt to minimize appellants'

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[15] This statement assumes that res judicata would bar not only an argument that an appellant failed to raise in an earlier appeal of the same action when he could have done so, but also an argument that was not considered in the earlier appeal even though the appellant raised it because he failed to present it first to OSC. I need not decide here whether this assumption concerning the reach of res judicata in these circumstances is correct.

¶14 unwitting forfeiture of arguments for relief by notifying them that all known whistleblower contentions concerning the challenged personnel action should be presented in initial complaints to OSC and subsequent IRA appeals.[16] Further, it should be kept in mind that res judicata is an affirmative defense that must be raised by a party and, absent special circumstances, should not be raised sua sponte by the Board. *See Stearn v. Department of the Navy*, 280 F.3d 1376, 1380-81 (Fed. Cir. 2002).

¶15 In general, I believe that the jurisprudential change made by our decision today will facilitate whistleblowers' presentation of their claims. The rule adopted here, which mandates that nonfrivolous allegations are the basis for the Board's IRA jurisdiction, is one that makes jurisdiction easier to establish. This rule is also consistent with the simplified pleading standard for civil actions generally that is found in Fed. R. Civ. P. 8(a)[17] and that was recently held applicable to employment discrimination actions by the Supreme Court in *Swierkiewicz v. Sorema N.A.*, 122 S.Ct. 992, 998 (2002). At the same time, conscious that changes may have adverse effects that we cannot fully anticipate until they have been experienced, I believe the Board's administrative judges should take special care to ensure that this change does not have an adverse impact on whistleblowers' ability to present their claims. In particular, our administrative judges should allow parties sufficient time to engage in the discovery needed to define what facts are involved in the determination of

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[16] Notification in the Board's acknowledgement order would appear to be too late because of the exhaustion rule. However, when it becomes clear that an appellant wishes to rely on additional protected disclosures not presented to OSC, the appeal could be dismissed without prejudice to permit exhaustion of the OSC remedy with respect to such alleged disclosures.

[17] Fed. R. Civ. P. 8(a) requires in pertinent part that a claim for relief shall contain "a short and plain statement of the grounds upon which the court's jurisdiction depends…" and "a short and plain statement of the claim showing that the pleader is entitled to relief…."

whether a "reasonable belief" is present, rather than too hastily concluding that a particular disclosure is insufficient to support such a belief. Particularly when pro se appellants are involved, the Board must not apply its decisions in a way that can make them a trap for the unwary party.

CONCLUSION

¶16 I agree that the Board should adopt the *Yunus* test for determining its jurisdiction in IRA appeals, that the appellant has met that test and is entitled to a hearing on the merits, and that the Board must overrule its contrary precedent in Geyer. I would broaden the Board's holding, however, to incorporate the holding of the court's decision in Spruill, which Yunus cites as controlling precedent. Specifically, "[w]hen a nonfrivolous claim for relief has been asserted before the Board [in an IRA appeal], and the outcome is determined by whether the facts support the claim, a decision by the Board that they do not is a failure to prove a claim, not a lack of jurisdiction…." Spruill, 978 F.2d at 689. Since the dismissals for failure to prove a claim under Spruill are decisions on the merits having res judicata effect, I believe the Board's administrative judges should attempt to minimize appellants' unwitting forfeiture of arguments for relief by notifying them that all known whistleblower contentions concerning the challenged personnel action should be presented in their initial complaints to OSC and subsequent IRA appeals.